IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

USA FINANCIAL SERVICES, LLC	)	
	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. U607-11-102
	)	
YOUNG'S FUNERAL HOME, INC. and CLARENCE E. YOUNG, JR.	)	
	)	
	)	
Defendants.	)	

Submitted: May 4, 2010
Decided: June 24, 2010

Patrick Scanlon, Esq., counsel for Plaintiff.
Tasha Stevens, Esq., counsel for Defendants.

DECISION AFTER TRIAL

CLARK, J.

This is an action for a deficiency judgment due to a default and repossession under a motor vehicle lease agreement. Trial was held on February 24, 2010, and the Court reserved decision. Additional briefing was submitted by the parties on May 3, 2010. The Court finds in favor of the Defendants, for the reasons set forth below.

FACTS

Clarence E. Young Jr., was the President and CEO of Young's Funeral Home Inc. On April 25, 2003, Young signed a "Motor Vehicle Lease Agreement" on behalf of the company and a personal "Continuing Guaranty" for the "lease" of a 1996 Cadillac hearse from plaintiff's predecessor in interest. The "lease" agreement provided for monthly payments of $592.36 for sixty-two (62) months, and then a final End of Term Balance payment of $1.00 and a $350.00 disposition fee for ownership of the vehicle.

When Young's defaulted on the payments for July, August, and September 2005, Plaintiff authorized repossession of the hearse; it was accomplished on October 13, 2005. On October 14, 2005, Plaintiff notified Defendants by letter that the vehicle had been repossessed and would be sold at auction. However, Plaintiff did not immediately place the vehicle for auction. Rather, it placed the vehicle at a used car lot, where it sat, without any maintenance or repair, and apparently without any interested buyers, for nearly a year. No valuation was made of the vehicle at the time of repossession or placement at the car lot.

Approximately ten months later, the vehicle was transferred to, and inspected at Manheim Auto Auction in Hatfield, PA. Subsequently, on October 12, 2006, the 1996 Cadillac hearse was sold at the Manheim Auction for $4,847.00. Plaintiff notified the Defendant via letter of February 20, 2007, that the vehicle had been sold and the outstanding balance due on the account was $17,021.04.

On November 20, 2007, Plaintiff filed this debt action seeking the deficiency amount remaining due under the lease after application of the auction proceeds, $17,371.04, plus $7,204.46 in pre-judgment interest and attorney's fees. Defendants dispute that any amount is owed, since they allege a verbal accord and satisfaction at the time of, and in exchange for, the surrender of the vehicle. Defendants alternatively dispute the amount of the claim.

DISCUSSION

(1) Accord and Satisfaction

Defendant Young testified that, at the time that Plaintiff sought to repossess the vehicle, he spoke to a representative of Plaintiff's who agreed to accept the repossession of the vehicle in lieu of further payments under the agreement. No other evidence of this accord and satisfaction was offered, and Plaintiff's manager, Richard Freshko,

testified that no such agreement was made. The Court finds that Defendants have failed to meet their burden of proof on this affirmative defense, and have not established accord and satisfaction.

(2) Security interest in the form of a lease agreement

Title 6, section 1-203(a) of the Delaware Code provides that the determination of whether a transaction in the form of a lease actually creates a lease or a security interest is determined by examining the facts of each case. The statute in pertinent parts defines the creation of a security interest as follows:

> (b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:
>
> . . .
>
> (4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

The agreement at issue in this case is titled a "Motor Vehicle Lease Agreement," and provided for monthly rent payments in exchange for the use of the 1996 hearse. However, the express language of the agreement at page 4 states:

> "CHARGES UPON TERMINATION BEFORE THE END OF LEASE TERM." "LESSEE MAY NOT TERMINATE THIS LEASE BEFORE THE END OF THE TERM WITHOUT LESSOR'S CONSENT AND ONLY UPON FULL PAYOUT OF THE LEASE."

Thus, under the agreement the lessee had no right or option to terminate the lease without payment in full of all amounts due under the agreement. The agreement also provided for a nominal payment of One Dollar at the completion of the lease to take ownership of the vehicle. Plaintiff's employee testified that Defendant had the right to purchase the vehicle for $1.00 at the end of the lease term. I find from the facts of this case that the lease agreement at issue meets the criteria of *Del. C.* § 1-203(b), and therefore created a security interest in the vehicle. Security interests in personal

property are governed by Revised Article 9 of the Uniform Commercial Code. Article 9 requires that any disposition of repossessed collateral be in a commercially reasonable manner[1], and that the debtor be given adequate notice of the intended disposition[2].

However, the provisions of Revised Article 9 place no burden upon a non-consumer debt secured party to prove compliance with its notice and disposition provisions in an action in which the deficiency is in issue unless "the debtor or a secondary obligor places the secured party's compliance in issue."[3] If compliance is placed in issue, "the secured party has the burden of establishing that the collection, enforcement, disposition or acceptance was conducted in accordance with" the relevant provisions of Article 9.[4]

A review of the record and the arguments and examinations during the trial show that the Defendants did place the Plaintiff's compliance in issue in this matter, even though they did not specifically allege in their pleadings that Article 9 applied to this transaction. In paragraph 13 of their response to Plaintiff's Motion for Summary Judgment, Defendants questioned the deficiency amount because the vehicle "was sold approximately one year after the repossession. It is unclear who was in possession of the vehicle during this time, the change in its value during this time, and how, if at all, it was being used." In her trial cross-examination of Plaintiff's manager Freshko, counsel for Defendants questioned him about the discrepancy between the October 14, 2005 repossession notice letter,[5] which stated that the vehicle would be "offered for sale at the Manheim Hatfield Auto Auction" in Pennsylvania, and the fact that that vehicle was actually held at a Delaware used car lot for ten months before being taken to Manheim

[1] 6 *Del.C.* § 9-610 (b).
[2] 6 *Del.C.* § 9-611 (b).
[3] 6 *Del.C.* § 9-626 (a) (1).
[4] *Id.*
[5] Plaintiff's Exhibit 2.

for auction. She also questioned the difference between the condition of the vehicle at the time of repossession, and its condition 10 months later when delivered to Manheim. Counsel for Plaintiff did not object to this line of questioning. I find from the foregoing that the Defendants adequately placed Plaintiff's compliance with the notice and disposition requirements of Article 9 in issue both in their pleadings and at trial.[6] Plaintiff therefore has the burden of proving that it provided adequate notice of disposition to Defendants, and that the disposition of the vehicle was done in a commercially reasonable manner.

(2) Statutory Notice Requirements of Revised Article 9

"A secured party that disposes of collateral under Section 9-610, shall send to the persons . . . a reasonable authenticated notification of disposition."[7] Section 9-613 (1) provides that the contents of the notice of disposition are sufficient if it:

> (A) describes the debtor and the secured party;
> (B) describes the collateral that is the subject of the intended disposition;
> (C) states the method of intended disposition;
> (D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
> (E) states the time and place of a public disposition or the time after which any other disposition is to be made.

When a notice lacks any information under subsection (1), the sufficiency of the notice becomes a question of fact for the Court to determine.[8] On October 14, 2005 Plaintiff's agent Freshko sent a letter to Defendants on USA Financial Services letterhead. The entire notice reads as follows:

> Dear Former Lessee,
> The above vehicle was repossessed. It will be offered for sale at the Manheim Hatfield Auto Auction in Hatfield, PA. Any proceeds received will be applied to your Termination Liability. If you have any questions, please contact me.

[6] *See United States v. Willis*, 593 F.2d 247, 258 (6th Cir. 1979), holding that Article 9 defense of commercial reasonableness was available when it was "raised by the defendants *at the trial below*." (*Emphasis added.)*
[7] 6 *Del. C.* § 9-611(b).
[8] 6 *Del.C.* § 9-613(2).

This notice was the sole communication the Defendants received from Plaintiff after the repossession and prior to disposition of the vehicle. I find this notice failed to meet the standards of Section 9-613, and further find from the evidence that the information provided in the notice was insufficient. The notice informed the Defendants that the vehicle would be auctioned at Manheim Auto Auction, thus by a public sale, but failed to provide any information about the time, or the full address of the location of the public sale. The notice also failed to inform the Defendants that they were entitled to an accounting of the unpaid indebtedness. Finally, I find the notice did not accurately state the intended disposition, because the vehicle was not immediately taken to Manheim for auction, but rather first was placed for sale at a used car lot for nearly a year.

(3) Resale of the vehicle was not commercially reasonable

6 *Del. C.* § 9-610(b) requires that every aspect of the disposition of the collateral including the method, manner, time, place and other terms be commercially reasonable. The determination of "whether a secured party's disposition of collateral is commercially reasonable must be considered on a case by case basis."[9] The UCC does not specifically provide a definition for the term "commercially reasonable." Therefore, the question of whether a resale was commercially reasonable becomes a question of fact to be determined by the Court.

Under Revised Article 9, the secured party is required to "make a showing that it conducted any resale of repossessed non-consumer collateral in a 'commercially reasonable' fashion, in order to be able to recover any alleged deficiency judgment from debtors."[10]

[9] *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 249 (Del. Supr. 2009).
[10] *PNC Bank v. Sills*, 2006 WL 3587247 * 4 (Del. Super. Nov. 30, 2006).

Plaintiff's manager Richard Freshko testified that the Cadillac hearse was transported back to the car dealership that initially sold the vehicle to the Defendants. However, Plaintiff provided no evidence as to how the hearse was advertised at the dealership, the efforts made by the dealership to store and maintain the vehicle, or whether the vehicle was even exhibited for sale on the lot. What is known is that the vehicle sat for approximately ten (10) months after its repossession before Plaintiff transported the vehicle to the Manheim Auto Auction in Hatfield, Pennsylvania. Mr. Freshko again could not provide the Court with any information as to how the hearse was advertised at Manheim, or how many times the vehicle went to auction. The hearse was finally purchased at a public auction for a price of $4,847.00, almost exactly a year after its repossession.

The Court finds that the Plaintiff's conduct in allowing the vehicle to sit idly for approximately one year after repossession was not commercially reasonable. The vehicle's value obviously would continue to depreciate the longer that the collateral waited for resale. More importantly, the factors contributing to the delay in the resale were a result of the Plaintiff's actions and well within the Plaintiff's control. Although a hearse is a specialty vehicle that is not purchased on a regular basis, the Plaintiff's delay to take the car to the public auction for ten months was not commercially reasonable.

Under Article 9, if a secured party in a non-consumer debt fails to prove compliance with the notice and disposition provisions, "the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of: (A) the proceeds of the collection, enforcement, disposition or acceptance; or (B) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement,

disposition or acceptance."[11] Unless the secured party proves otherwise, the amount that would have been realized had the disposition been conducted in accordance with Article 9 is deemed to be "equal to the sum of the secured obligation, expenses, and attorney's fees."[12] Plaintiff offered no proof as to what the vehicle would have brought had it been immediately sold at auction rather than sit for a year. Thus, the Court holds that, if the vehicle had been sold in a commercially reasonable manner, it would have brought proceeds equal to the total amount of the Defendants' obligation to Plaintiff.

CONCLUSION

Under Delaware law, the "Motor Vehicle Lease Agreement" was a secured transaction with the meaning of 6 *Del. C.* § 1-203. Plaintiff was required to comply with the applicable provisions in Revised Article 9. Because the Plaintiff failed to provide proper notice of disposition and failed to conduct the resale of the vehicle in a commercially reasonable manner pursuant to Revised Article 9, the Plaintiff is barred from recovering any deficiency judgment against the Defendants. Judgment is entered in favor of Defendants and against Plaintiff. Plaintiff shall bear the costs of suit.

IT IS SO ORDERED, this ____day of June, 2010.

_____
Kenneth S. Clark Jr.
Judge

[11] 6 *Del.C.* § 9-626 (a) (3).
[12] 6 *Del.C.* § 9-626 (a) (4).